IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.152 of 2004

Nirmala Manherlal Shah)
of Mumbai, Adult, Indian)
Inhabitant, residing at 11, New)
Indra Bhavan, 101-A, Walkeshwar)
Road, Mumbai-400 006.)...Petitioner

Versus

1.The State of Maharashtra)
through Government Pleader,)
High Corut, Mumbai.)
2.The Superintendent of Stamps)
having addres at General)
Stamps Office, Town Hall,Fort)
Mumbai-400 023.)
3.The Collector of Stamps,)
having address at General)
Stamp Office, Town Hall, Fort)
Mumbai-400 023.)
4.The Deputy Inspector General)
of Registration -and-Deputy)
Coontroller of Stamps,)
Maharashtra having address)
at General Stamp Office, Town)
Hall, Fort, Mumbai-400 023.)...Respondents

Mr. K.T.Kukreja i/b. Kukreja & Co., for Petitioner
Mr. K.R. Belosey, AGP for Respondents.

CORAM: F.I. REBELLO & S.P.KUKDAY, JJ.

DATE : 3rd May, 2005

ORAL JUDGMENT (PER F.I. REBELLO, J.):

. Rule. Heard forthwith.

2. The petitioner entered into an agreement with M/s.Diamond Creck dated 19th July, 1980. By that agreement M/s.Diamond Creck agreed to acquire, assign and transfer all the benefits of the Agreement dated 13th November, 1978 between M/s.Unique Enterprises (India) and M/s.Diamond Creck

together with right to occupy, enjoy and possess the premises. The price was set out. The transaction was to be completed within 15 days of the Agreement. The petitioner lodged the agreement with the Collector for an endorsement whether the document was properly stamped. On 5th March, 2003 the petitioner received a demand notice by hand delivery informing that the agreement submitted was impounded under Section 32 of the Bombay Stamp Act, 1958. The petitioner was called upon to pay a sum of Rs.87,200/- as stamp duty and Rs.1,74,000/- as penalty, thus aggregating to a sum of Rs.2,61,600/-. It is the case of the petitioner that she informed the respondents that the demand was illegal as the amendment by way of explanation to Article 24 of Schedule I to the Bombay Stamp Act 1958 came into force on 9th December, 1985 and the execution of the agreement was on 19th July, 1980. Though the petitioner was not bound to pay the amount, the petitioner however paid Rs.2,61,600/- under protest under covering letter dated 11th March, 2003 which according to the petitioner was not acknowledged. The sum of Rs.2,61,600/- was accepted and receipt issued. The petitioner thereafter by letter of 4th August, 2003 after drawing the attention of the Respondents to the judgment of this Court called for refund of the amount with interest at 12% p.a. As the respondents failed to refund the said amount the present petition with the reliefs as prayed for.

3. On behalf of the respondents Samir Madhav Kurtkoti, Additional Superintendent of Stamps has filed an affidavit. It is set out that Section 32A of the Bombay Stamp Act, 1958 was substituted with effect from 4th July, 1980 by Section 10

of Maharashtra Act 27 of 1985. By virtue of Section 32A as amended any instrument of conveyance or transfer of lease by way of assignment executed on or after 4th July, 1980 is included. It is pointed out that this was required to be introduced as there was a deliberate avoidance of payment of stamp duty on conveyance and the State revenue suffered seriously. It is set out that the petitioner paid Rs.5/- only as stamp which was the duty in the year 1980, but did not produce it for registration and presented the said document for adjudication on 13th November, 2002 after nearly 22 years with a deliberate view to avoid payment of stamp duty. As she could not sell the property without payment of the stamp duty the petitioner presented the document for adjudication on 13th November, 2002. Adverting to the judgment of the learned Judge of this Court in Padma Nair Vs. The Deputy Collector, Valuation and Stamp Duty, and Anr. AIR 1994 Bom.160, it is set out that the judgment is not applicable as in that case the petitioner had lodged the same for registration on the date of execution i.e. on 16th October, 1984.

4. We have heard learned Counsel for the parties and the contentions as urged therein. Two issues arise in this petition, (1) If a document was submitted under Section 31 of the Bombay Stamp Act, 1958 for adjudication whether it was open to the respondent to impound the said document and demand the stamp duty and penalty in terms of the demand made on the petitioner and (2) whether the agreement to sell entered into in the year 1980 requires payment of Court Fees in terms of the amendment to the Bombay Stamp Act, 1958 which in so far as payment of stamp duty is concerned came into effect from 10th

December, 1985.

5. We may first deal with the issue of Section 31 of the Bombay Stamp Act. Section 31 provides that if a document as set out therein is brought to the Collector by one of the parties to the instrument and such person applies to have the opinion of that officer as to the duty with which or the Article of Schedule I under which it is chargeable and pays a fee of one hundred rupees, the Collector shall determine the duty with which or the Article of Schedule I under which in his judgment, the instrument is chargeable. The petitioner has paid the fees of Rs.100/-. The other sub-section provides for the procedure and the requirement as to what is to be done when a document is to be submitted. The power, therefore, referable under Section 31 is a power of adjudication for deciding what is the stamp duty payable. A similar issue came up for consideration before the Apex Court in the case of **Government of Uttar Pradesh and Ors. vs. Raja Mohammad Amir Ahmad Khan, AIR 1961 SC 787** under the provisions of the Stamp Act 1899. One of the issues for consideration was Section 31(1) of the Stamp Act which for all purposes is in para materia with Section 31(1) of the Bombay Stamp Act, 1958 except to the extent of the fees. On considering the true scope of Section 31 and other provisions the Apex Court observed as under:-

> "It would be an extraordinary position if a person seeking the advice of the Collector and not wanting to rely upon an instrument as evidence of any fact to be proved nor wanting to do any further act in regard to

> the instrument so as to the effectuate its operation should also be liable to the penalties which unstamped instruments used as above might involve. The scheme of the Act shows that where a person is simply seeking the opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under S.31. If it is not properly stamped and the person executing the document wants to proceed with effectuating the document or using it for the purposes of evidence, he is to make up the duty and under S.32 the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than seeking the determination of the duty payable then no consequence will follow and an executed document is in the same position as an instrument which is unexecuted and unstamped and after the determination of the duty the Collector becomes functus officio and the provisions of S.33 have no application. The provisions of that section are a subsequent stage when something more than mere asking of the opinion of the Collector is to be done."

From the ratio of the said judgment it will be clear that when an application is moved under Section 31 the jurisdiction of the Collector is limited to decide or determine the duty payable. Once he does so he becomes functus officio and in those cases he cannot apply the provisions of Section 33 of the Stamp Act which is similar to Section 32 of the Bombay Stamp Act which is the power to impound the instrument. The

action, therefore, of the respondents in impounding the document was clearly without jurisdiction and on this count alone the order to impound dated 5th March, 2003 is liable to be set aside and the relief of refund as sought for by the petitioner will have to be allowed.

6. Having said so we may now deal with another issue as to whether the amendment Act 27 of 1985 is applicable. At the out set it may be pointed out that two learned single Jduges of this Court in Padma Nair Vs.The Deputy Collector, Valuation and Stamp Dutyand Anr. AIR 1994 Bom.160 and in ITC Ltd.& Anr. Vs. The State of Maharashtra & Ors.,1997 (4) Bom.C.R.536, have held that they would not apply to transactions before 9-12-1987. We may examine the said contention. On behalf of the Respondents it is submitted that they require reconsideration. Maharashtra Act 27 of 1985 came into force from 9-12-1987. Schedule I to the Act was substituted by new schedule. Conveyance was included under Article 25 of Schedule I and the fees payable thereunder were set out.There were Explanations of which Explanation 1, provided that where in the case of agreement to sell an immovaeable property, the possession of any immoveable property is transferred or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of such agreement, then such agreement to sell, shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly. In other words though normally the Agreement to sell does not result in any interest or property being transferred, nevertheless by the explanation if the

ingredients as set out therein were established, such an agreement is deemed to be a conveyance and stamp paper has to be paid accordingly. We may gainfully reproduce the relevant portion of the Article :-

> "Explanation 1--For the purposes of this article, where in the case of agreement to sell an immovaeable property, the possession of any immoveable property is transferred or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly;
>
> Provided that, the provisions of section 32A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid as they apply to a conveyance under that section.
>
> Provided further that, where subsequently a conveyance is executed in pursuance of such agreement of sale, the stamp duty, if any, already paid or recovered on the agreement of sale which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance."

. Learned Counsel on half of the respondents had drawn the attention of the Court however to Section 32A which was substituted with effect from 4th July, 1980 by Maharashtra Act

27 of 1985. That Section requires that every instrument of conveyance, exchange, gift, certificate of sale, deed of partition or power of attorney to sell immoveable property when given for consideration, deed or settlement or transfer of lease by way of assignment, presented for registration under the provisions of Registration Act, 1908, shall be accompanied by a true copy thereof. The proviso provides that in respect of instrument accepted on or after 4th July, 1980, to the date of commencement of the Bombay Stamp (Amendment) Act, 1985, an extract of the instrument to be taken from the registration record shall be deemed to be the true copy accompanying the instrument, presented for registration for the purposes of sub-section (1). Under Sub-section (2) if any officer registering such instrument has reason to believe, on the basis of the information available with him in this behalf, that the market value of the immovable property which is the subject matter of such instrument has not been truly set forth therein, he may, immediately after presentation of such instrument, give a notice to the person who is likely to pay the stamp duty under Section 30, calling upon such person to pay the deficit amount of stamp duty and a penalty at the rate of 2 per cent of the deficient portion of the stamp duty, for every month or part thereof from the date of execution of such instrument. The other provision provides for effect of payment or non-payment. In other words the Section would come into play if the document is presented for registration or if such document is presented before any of the person or authority as specified under Section 33, in which event the Collector may proceed to pass orders for payment of deficient stamp duty. The learned Judge in the case of Padma Nair

(supra) after considering the matter was pleased to hold that Article 25 in Schedule I considering the explanation would be applicable to agreements made with effect from 9th December, 1985 and not earlier. The matter again came up for consideration before another learned single Judge in the case of **ITC Limited & Anr. vs. The State of Maharashtra & Ors., 1997 (4) Bom.C.R. 536.** In that case also the agreement was executed in the year 1973. and stamp duty of Rs.5/- was paid. The Collector-stamps insisted that considering the amendment full stamp duty with penalty had to be paid. The learned Judge relied upon the judgment in the case of Padma Nair (supra) and also independently came to the conclusion that the amendment under Item 25 would not be applicable to agreements which were entered into before 9th December, 1985.

. These judgments hold the field. Padma Nair (supra) was a judgment delivered on 28th July, 1993. The decision of Padma Nair has been followed subsequently. The State Government, it appears, has not challenged the correctness of the view taken in Padma Nair and for the last 12 years this is the view and Item 25 is understood in terms of the law as set out in Padma Nair (supra).

. The learned Counsel for the respondents, as pointed out earlier, sought to rely upon Section 32A on the ground that it was made applicable retrospectively from the year 1980. As noted earlier Section 32A would be applicable if the document was presented for registration or had come up before the authorities under Section 33 of the Act. Section 32A was referred to in the case of Padma Nair (supra). Even otherwise

all that Section 32A would mean is that every instrument of conveyance if presented for registration under the provisions of Registration Act, power has been given to the Officer to examine whether it has been properly stamped. Though Section 32A was introduced by Act 27 of 1985 and the Schedule to the Act was also substituted Act 27 of 1985 nevertheless in so far as Item 25 is concerned it was made applicable and/or came into force only with effect from 9th December, 1985. Therefore, the explanation under Item 25 if the agreement is held to be a conveyance the fees as amended would be payable after 9th December, 1985. If the document is not presented for registration it would have the same effect as an unexecuted document. We are, therefore, of the view that the view taken in Padma Nair (supra) and ITC Ltd. (supra) would be the correct interpretation of Item 25 of Schedule I to the Bombay Stamp Act. We, therefore, have no reason to differ from the view taken by the two learned Single Judges of this Court.

7. In the instant case as we have already noted the document was impounded when the petitioner had applied under Section 31. The action of the respondent was clearly without jurisdiction. Even otherwise considering the answer to Issue No.2 on the date the agreement was entered into the document was properly stamped. In the light of that the petition will have to be allowed.

8. Rule accordingly made absolute in terms of prayer clause (a) as also prayer clause (b), except the interest on the sum of Rs.2,61,600/- will be at the rate of 6% per annum

from 12th March, 2003 till payment/realisation. In the circumstances there shall be no order as to costs.

(F.I. REBELLO, J.)

(S.P. KUKDAY, J.)